Before the
Federal Communications Commission
Washington, D.C. 20554

Comments - NBP Public Notice #13 **GN Docket Nos. 09-47, 09-51, 09-137**

COMMENTS OF SOUTHEAST TELEPHONE, INC.

ON

BROADBAND STUDY CONDUCTED BY THE BERKMAN CENTER FOR INTERNET AND SOCIETY

November 16, 2009

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Broadband Study Conducted By	)	
The Berkman Center for Internet	)	GN Docket Nos. 09-47, 09-51, 09-137
And Society	)	
	)	
NBP Public Notice # 13	)	

COMMENTS OF SOUTHEAST TELEPHONE, INC.

SouthEast Telephone, Inc. files these comments in response to the Federal Communications Commission's ("Commission's" or "FCC's) October 14, 2009, Public Notice seeking comment on the broadband study ("Berkman Study") conducted by the Berkman Center for Internet and Society. The Berkman study's ultimate conclusion that open access policies have been successful in countries around the world, and that the U.S. would benefit by adopting such policies which tend to speed broadband deployment and penetration, while keeping the ultimate cost to the consumer comparable to the service they receive.

I. INTRODUCTION & SUMMARY

SouthEast Telephone, Inc. opened its doors in Pikeville, KY, in 1997 with the mission to provide quality telecommunications services to the rural areas of Eastern Kentucky. The company was the first certified CLEC (Competitive Local Exchange Carrier) in the Commonwealth and today provides service in fifty-two (52) rural counties of Kentucky. SouthEast offers a local competitive alternative to the regional providers in the local, long distance, and broadband markets throughout rural Eastern and Central

Kentucky. SouthEast would like to take this opportunity to concur with the central finding of the Berkman Study, "open access policies, in particular unbundling, played an important role in facilitating competitive entry in many of the countries observed."[1]

The Telecommunications Act of 1996, set out a migration path for competitors entering the market - a path that would allow the entrants to build capital as they progressed through the migration. Congress clearly anticipated that many companies would enter the telecommunications industry first through resale, then utilize UNE-P (Unbundled Network Element Platform) to gain both customers and the additional income required to move to the last step of the migration – becoming a facilities-based competitor. This was and still is the business plan of SouthEast Telephone.

As the first CLEC in the Commonwealth of Kentucky, SouthEast vigorously embraced the migration model, but unlike most CLECs, began providing local service to its customers via resale, in the less lucrative rural markets throughout eastern and central Kentucky. As its customer base grew, SouthEast gradually began providing local service utilizing UNE-P and eventually entered the dial-up and DSL broadband market. In 2002, SouthEast began the process of becoming a facilities based provider by collocating DSLAMs (Digital Subscriber Line Access Multiplexer) alongside BellSouth equipment and extending DSL service to previously un-served or underserved areas. For two (2) years, SouthEast continued to gain customers and construct infrastructure as envisioned by Congress and the 1996 Act.

However, when the Triennial Review Remand Order ("TRRO") was released by the Commission in February, 2005, CLECs nationwide found themselves without

[1] "Next Generation Connectivity: A Review of Broadband Internet Transitions and Policy From Around the World," Berkman Center for Internet & Society at Harvard University, October 2009 draft.

access to switching at TELRIC based rates. Instead, switching prices were market based and available only by Commercial Agreements offered by the ILECs.

In March 2005, the FCC continued down the de-regulatory path by eliminating the requirement to provide stand alone DSL service to competitors. According to the March 28, 2005, article "***Bells Freed From Naked DSL,"*** by Roy Mark of www.internetnews.com, "The traditional regional telecommunications companies are increasingly losing landline customers to rival local companies, wireless services, and Internet telephony. In an effort to staunch the losses, the Bells want to force users of its DSL to also use its landline voice services."[2]

Only nine (9) years after passage the 1996 Telecommunications Act, CLEC advancement along the "migration path" set out by the Act, was stymied by the two (2) adverse Commission rulings. Losing the TELRIC based switching rate and the ability to provide DSL on its own lines, left companies such as SouthEast without the essential services needed to grow the subscribers and revenues required to become a facilities-based provider.

II. FINDINGS OF THE BERKMAN STUDY

Harvard Law School conducted an interview with Yochai Benkler, who headed the Berkman Study and inquired as to the key takeaways of the study. Mr. Benkler stated that in response to the first question "how is the U.S. doing?", the answer is "we're overall middle of the pack, no better." In response to the second question, "what policies and practices have worked for countries that have done well," Benkler stated

[2] *"Bells Freed From 'Naked' DSL,"* Roy Mark, **www.internetnews.com/bus-news/article.php/3493191 ,** March 28, 2005.

that "there is good evidence to support the proposition that a family of policies called 'open access' encourage competition, and played an important role."[3]

III. The Study

The Berkman Study reviewed plans and practices pursued by other countries, such as Japan, Denmark, and the Netherlands, in the transition to the next generation of connectivity, as well as their past experiences, and found that:

> "open access" policies – unbundling, bitstream, access, collocation requirements, wholesaling, and/or functional separation – are almost universally understood as having played a core role in the first generation transition to broadband in most of the high performing countries; that they now play a core role in planning for the next generation transition; and that the positive impact of such policies is strongly supported by the evidence of first generation broadband transition.[4]

The Study directly attributes this country's status as a 'middle of the pack' performer to several Commission Orders that abandoned the effort to implement open access and shifted the focus of American policy from the idea of regulated competition within each wire, to competition between the owners of the two (2) wires."[5]

IV. CORE FINDINGS

The core finding discussed in the Berkman Study is the same proposition that CLECs, like SouthEast have been arguing for the last six (6) years. Unbundling is essential for competition and broadband expansion. In countries with a policy of open access;

> " unbundling, played an important role in facilitating competitive entry in many of the countries

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[3] *"Major new study by Benkler and the Berkman Center released by the FCC for public comment as part of the National Broadband Plan."* **www.law.harvard.edu/news,** October 16, 2009.

[4] *"Next Generation Connectivity"* at 9.

[5] *Id.* at 82.

> observed; In many cases, even where facilities-based alternatives were available, unbundling based entrants played an important catalytic role in the competitive market; In some cases, competition introduced through open access drove investment and improvement in speeds, technological progression, reduced prices, or service innovations."[6]

In contrast, in countries such as Germany, and Canada, "where unbundling was formally available but weakly implemented, competition was limited to facilities-based entrants, with weaker results.[7] In the United States, "implementation of unbundling was burdened and thwarted, largely by ILEC's resisting implementation through foot-dragging and litigation, but also by a judiciary highly skeptical of the theory behind unbundling, receptive to the arguments of ILECs, and exhibiting little deference to the judgment of the FCC."[8]

V. CONCLUSION

The Telecommunications Act of 1996, was designed to foster rapid development of competition in markets served by ILECs. SouthEast followed the "migration path" envisioned by the Act and entered the market via resale of the ILEC service, then the company began leasing lines from the ILEC via UNE-P and receiving carrier access billing ("CABs) for the origination and termination of traffic. However, SouthEast's migration to a facilities based provider was thwarted by the demise of UNE-P and the inability to provide standalone DSL.

The most recent FCC Local Competition Report (12/31/07 data) shows the dramatic decline in UNE-P, from 17.1 million in June 2004 – to 5.5 million in December 2007. According to "*Telecommunications Competition: Where is it and Where is it*

[6] *Id*. at 76
[7] *Id*. at 76
[8] *Id*. at 78

Going?," the presentation given by David Brevitz, C.F.A. at the 36th Annual PURC Conference in February, 2009, "CLEC mode of entry (resale/UNE) for mass market residential service is in significant decline, with not evident prospects of substantial reversal."[9] "Mr. Brevitz further stated that CLECs are reliant on the ILEC for local loop facilities, and that the ILEC controls prices and terms for both UNE-P "like" offerings, and retail services against which CLECs must compete."[10]

The local loop is an integral piece of SouthEast's local service business model due to its pricing. Since the company only operates in the rural areas of eastern and central Kentucky, better known as Zone 3, it must pay a loop rate of $30.59 per line. Whereas, CLECs competing in the more metropolitan areas of Zone 1 are only charged $9.64 per loop. High loop pricing combined with the ILEC controlled switching rate makes it difficult for SouthEast to effectively compete with an enterprise like AT&T.

Resale is not a viable alternative for SouthEast because the state mandated retail rate is generally more expensive than the services that AT&T provides its own end users. Another factor that must be considered in any resale formula is that SouthEast does not receive any CABs revenue when customers are place on the resale platform. CABs revenues are very important to SouthEast's business plan and it's ability to continue serving the customers of rural Kentucky.

SouthEast provides facilities based broadband service to approximately 1,503 customers. If SouthEast wishes to provide DSL service to the rest of its customer base, it must do so by purchasing AT&T retail DSL and provisioning it on a resale line.

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[9] *"Telecommunications Competition: Where is it and Where is it Going?"* David Brevitz. **36th Annual PURC Conference**, February 5, 2009.

[10] *Id.* at 11.

Once again, SouthEast does not receive CABs revenue on resale lines and unfortunately AT&T can then restrict the broadband services SouthEast can provide to its customers. For example, AT&T does not offer SouthEast the lowest priced and bestselling "DSL Lite" product or the fastest DSL product, DSL Extreme 6.0.

Based upon the reasons contained within, SouthEast respectfully urges the Commission to reconsider the policies of old, which clearly have failed to introduce viable competition, especially in rural markets, and take a look back to the original intent of the 1996 Telecommunications Act, even if this means "taking a step" back and re-evaluating unbundling requirements and the ability to provision of DSL on a wholesale basis to rural CLECs.

Respectfully submitted

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